STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK WILLIAM KUTCHMAREK,

Defendant-Appellee.

UNPUBLISHED
April 15, 1997

No. 193362
Kent Circuit
LC No. 95-2254-FH

Before: Taylor, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3). Defendant was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to 5 to 22½ years' imprisonment. He appeals as of right. We affirm.

On August 4, 1995, at approximately 8:30 or 9:00 p.m., the 12-year old victim was in a Meijer store with his mother. At some point, the victim left his mother and went to look at sprinklers. While in the sprinkler aisle, a man pinched the victim's buttocks and said to the victim that he had a nice butt. The victim then ran to his mother and reported the incident to her. The mother had the victim repeat the account to Meijer personnel. According to the victim, he assured Meijer security personnel that he could identify his attacker. The victim searched the store with security personnel looking for defendant. After the victim pointed out defendant to security personnel, defendant ran. Security personnel tackled and apprehended defendant, and the victim identified defendant as the man who had pinched his buttocks.

I

Defendant first claims that the victim's in-court identification of him violated his due process right to a fair trial because that identification was based on two earlier improper procedures, namely an on-the-scene identification and a photo show-up, both of which occurred without the presence of defendant's counsel. We disagree. A trial court's decision to admit identification evidence will not be

reversed on appeal unless it was clearly erroneous. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Generally, an accused is entitled to be represented by counsel at pretrial identification procedures. *People v Anderson*, 389 Mich 155, 168; 205 NW2d 461 (1973). This right is founded on due process. *People v Jackson*, 391 Mich 323, 338; 217 NW2d 22 (1974). The right to counsel generally does not attach to prompt on-the-scene identifications. *People v Wilki*, 132 Mich App 140, 143-144; 347 NW2d 735 (1984). This procedure allows the police to know whom to arrest and assures the expeditious release of innocent suspects. It also allows the victim to confirm identification when his memory is fresh and accurate. *Id.* The suspect, however, must have the benefit of counsel at a prompt at-the-scene identification if "the police, acting in good faith, have no reasonable necessity for confirming that the suspect they have apprehended is in fact the perpetrator" because of "very strong evidence" such as that the suspect "has confessed or presented the police with either highly distinctive evidence of the crime or a highly distinctive personal appearance." *Id*. at 144.

In this case, we find that law enforcement personnel did not have "very strong evidence" that would have required the presence of counsel for defendant. Defendant did not exhibit "either highly distinctive evidence of the crime or a highly distinctive personal appearance." Defendant even concedes that "[t]he record does not suggest that [defendant] possesses any special features which clearly distinguish him from others." Furthermore, the evidence against defendant was not so strong that the deputy chose to arrest without the victim's identification of defendant while he was being held in the loss prevention room. The deputy testified that the identification was part of "me getting probable cause." Compare, *Wilki, supra*.

Moreover, the concern with a pretrial identification is whether it was "unnecessarily *suggestive* and conducive to irreparable mistaken identification that [defendant is] so denied due process of law." *People v Kachar*, 400 Mich 78, 90; 252 NW2d 807 (1977). We find that on the facts presented, there simply can be no concern that the police suggested to the victim that defendant committed the crime where it was *the victim* who went searching through the store and first identified defendant to security personnel.

Defendant also contends, and the prosecution concedes, that the private showing of the photographs of defendant to the victim was improper. Counsel must be present at a photographic identification of an accused who is in custody. *Id.* at 88-89. When an impropriety occurs, the prosecution must establish by clear and convincing evidence that the in-court identification has a sufficient independent basis to purge the taint caused by the illegal confrontation. *Id.* at 97. Here, we find that the victim's earlier independent identification of defendant to security personnel as defendant roamed the aisles of the store where the incident occurred, purged the taint. Furthermore, the testimony of the victim, his mother, and security personnel was clear and convincing on this point. We therefore conclude that defendant was not denied due process by the deputy-urged identification or the showing of the photographs because the victim had independently identified defendant as the assailant.

II

Defendant next argues that he was denied the benefit of his bargain with the prosecutor to waive his preliminary examination in exchange for a dismissal of the habitual offender charge because the prosecutor did not dismiss that charge. Defendant also claims that he was denied effective assistance of counsel because trial counsel failed to enforce the bargain. We find defendant's arguments devoid of merit. The preliminary transcript does not support defendant's claim that the prosecutor promised to forgo a supplemental charge in exchange for defendant's waiver of his preliminary exam. The prosecutor's promise to forgo a supplemental charge was offered in return for a plea. [1] No plea occurred in this case.

III

Defendant further argues that the CSC II statute, MCL 750.520c; MSA 28.788(3), and the applicable jury instructions violate due process because they allow a jury to convict based upon reasonably construing, as opposed to proof beyond a reasonable doubt, that intentional touching was for a sexual purpose. We disagree. We initially note that defendant's failure to challenge the constitutionality of this statute before the trial court normally precludes appellate review unless the issue raises an important constitutional issue of first impression. *People v Hubbard (Aft Rem)*, 217 Mich App 459, 483; 552 NW2d 493 (1996). Furthermore, absent an objection in the trial court regarding a jury instruction, the issue is reviewed only for manifest injustice. *People v Maleski*, 220 Mich App 518, 521; ___ NW2d ___ (1996). In any event, a statute challenged on a constitutional basis is clothed in a presumption of constitutionality. *Johnson v Harnischfeger Corp*, 414 Mich 102, 112; 323 NW2d 912 (1982); *Hubbard*, *supra*. Moreover, a court is obligated to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Hubbard*, *supra* at 483-484.

Due process protects a defendant against conviction except upon proof beyond a reasonable doubt "of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). In this case, the flaw in defendant's argument is that CSC II is not a specific intent crime. *People v Fisher*, 77 Mich App 6, 12; 257 NW2d 250 (1977). A defendant's specific intent is not an essential element of the crime. *Id*. at 13.

Moreover, defendant's discussion of cases holding that conclusive presumptions are forbidden in criminal prosecutions is misplaced. Although the touching must be intentional, a defendant's intention regarding his intentional touching is not an essential element of the crime. In addition, the statute and the jury instructions speak of intentional touching that "can" or "could" be construed as being for a sexual purpose. There is nothing in either the statute or the jury instructions that *mandates* that the jury presume anything.

IV

Defendant also argues that the statutory definition of "sexual contact," MCL 750.520a(k); MSA 28.788(1)(k), is unconstitutionally vague. We disagree.

A statute may be challenged for vagueness on three grounds: (1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms. *Hubbard*, *supra* at 484. When making a vagueness determination, a court must take into consideration any judicial constructions of the statute. *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994). We review de novo a challenge to a statute's constitutionality under the void-for-vagueness doctrine. *Hubbard*, *supra*.

Where, as here, the First Amendment is not implicated, the challenger must show how the statute is infirm regarding his particular conduct which is at issue in the case. *Lino*, *supra* at 575-576. As such, defendant's argument concerning changing diapers, hugs, and other potentially ambiguous behaviors is irrelevant. Regarding defendant's conduct of pinching the buttocks of a twelve-year-old boy, a complete stranger, in the aisles of a department store and simultaneously telling the boy that he had a nice butt, we find it impossible to reasonably construe it as anything other than for a sexual purpose.

V

Defendant further claims that his sentence of 5 to 22½ years imprisonment, the maximum penalty under the habitual offender statute, MCL 769.10; MSA 28.1082, is disproportionate. We disagree. This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality. *People v Gatewood (On Rem)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). The principle of proportionality requires that the sentence imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

According to the presentence report, defendant, age 27, had an extensive prior record. Defendant's juvenile record is comprised of four adjudications: 11/6/80, assault and battery; 1/9/84, larceny under $100; 12/27/84, another larceny under $100; and 2/4/85, two counts of unlawfully driving away an automobile, two counts of malicious destruction of property (MDOP) under $100 and one count MDOP over $100. As an adult, defendant continued on his criminal path with two misdemeanors, namely, 2/5/86, larceny under $100, and 6/30/86, OUIL per se. Defendant then escalated his criminal activities to the felony level with convictions in May 1988 for burning real property and breaking and entering an unoccupied dwelling. Moreover, defendant was on parole at the time he committed the instant offense.

As for the nature of the crime, the comments of the trial judge are instructive:

> This is the type of case, I think, which upsets people, Mr. Kutchmarek, because it's in a public store; it's a public place. A woman and her son should be able to go into the stores without being afraid of what might happen or what can occur in those stores . . . it's preying on young children in a public place where people normally want to feel

> safe and it leaves a parent feeling helpless as to whether or not he or she can ever protect a child adequately.

We conclude that defendant's sentence is proportional to the offender and the offense.

Affirmed.

/s/ Clifford W. Taylor
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] At the preliminary examination, the prosecution stated, and defense counsel concurred, that "the plea offer for the record is, upon successful plea and sentencing to Count I, CSC second, the Prosecutor's office will not write any Supplemental Information."